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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1993

PAUL F. SOARES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

DID THE DISTRICT COURT DENY PETITIONER HIS RIGHT TO DUE PROCESS, TO A FAIR TRIAL, TO PRESENT A DEFENSE OR OTHERWISE COMMIT ERROR BY PRECLUDING PETITIONER FROM PRESENTING AN ADVICE OF COUNSEL DEFENSE BASED UPON THE COURT'S INTERPRETATION OF THE INTENT REQUIREMENT OF THE ERISA CRIMINAL STATUTE (18 U.S.C. § 1954), *VIZ.*, THAT NO SPECIFIC INTENT TO VIOLATE THE LAW WAS REQUIRED?

II.

DID THE DISTRICT COURT DENY PETITIONER HIS RIGHT TO DUE PROCESS OR OTHERWISE COMMIT ERROR BY FINDING THE EVIDENCE SUFFICIENT TO SHOW THAT PETITIONER EMBEZZLED FROM A TRUST FUND, IN VIOLATION OF 18 U.S.C. § 664, WHERE THE RECORD WAS UNDISPUTED THAT PETITIONER'S RECEIPT OF FUNDS WAS FOR REIMBURSEMENT OF OUT-OF-POCKET EXPENSES?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings before the United States Court of Appeals for the Ninth Circuit were petitioner Paul F. Soares (the appellant below) and respondent United States of America (the appellee below).

The parties to the proceedings before the trial court (United States District Court for the Northern District of California) were the petitioner (then a defendant) and respondent (then the plaintiff).

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UNITED STATES OF AMERICA,

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

The petitioner, Paul F. Soares, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, filed on July 6, 1993, with rehearing denied on September 20, 1993, affirming petitioner's conviction for (1) violation of the ERISA criminal statute, 18 U.S.C. § 1954 and (2) embezzlement, in violation of 18 U.S.C. § 664.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is published at 998 F.2d 671 (9th Cir. 1993) and is reproduced in the Appendix hereto. App. 1-11.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit against petitioner Soares was entered on July 6, 1993. The judgment affirmed the March 19, 1992 conviction of petitioner Soares for (1) violation of the ERISA criminal statute, Section 1954 of Title 18 of the United States Code and (2) embezzlement, in violation of Section 664 of Title 18 of the United States Code.

On September 20, 1993, the United States Court of Appeals for the Ninth Circuit denied a timely petition for rehearing of its judgment, affirming the conviction of petitioner Soares. App. 12.

Petitioner Soares was sentenced on September 2, 1992. He received a sentence of twelve months imprisonment on each count of conviction, the sentences to run concurrently, fifty dollar special penalty assessment on each count. App. 13-17.

The statutory provision conferring jurisdiction on this Court to review the judgment of the Court of Appeals by writ of certiorari is Section 1254 of Title 28 of the United States Code.

STATUTES AND CONSTITUTIONAL AUTHORITIES INVOLVED

The constitutional provisions involved in the case are the Due Process Clause of the Fifth Amendment and the Jury Trial and Fair Trial Clauses of the Sixth Amendment and right to present a defense guarantee of the Fifth and Sixth Amendments to the United States Constitution. The United States Code section statutory provisions are Sections 664 and 1954 of Title 18 of the United States Code. These constitutional provisions and federal statutes are set forth in the Appendix hereto. App. 42-45.

STATEMENT OF THE CASE

A. Procedural Summary

Petitioner Paul F. Soares was charged by indictment in the United States District Court for the Northern District of California with four counts of having received kickbacks "because of" his fiduciary position as an investment advisor for an employee pension fund, in violation of 18 U.S.C. § 1954, and with three counts of embezzlement of money from the same employee pension fund, in violation of 18 U.S.C. § 664. Jurisdiction of the District Court was predicated upon Section 3231 of Title 28 of the United States Code.

Prior to trial, petitioner Soares filed a motion *in limine* seeking the District Court's determination of the intent requirement for § 1954, as petitioner planned to present an advice-of-counsel defense. The District Court

ruled that the "because of" language of § 1954[1] does not require proof of specific intent for liability, thereby precluding petitioner from presenting his intended advice-of-counsel defense. App. 25-30.

As a result of that ruling, petitioner Soares waived his right to a jury trial. On February 10, 1992, by stipulation of the parties, the trial proceeded by way of written offers of proof and documentary exhibits. On March 19, 1992, the District Court entered its verdict, finding petitioner Soares guilty of four counts of violating 18 U.S.C. § 1954 and of one count of violating 18 U.S.C. § 664, the remaining two counts charging embezzlement having been dismissed on motion of the government. On September 2, 1992, the District Court sentenced petitioner Soares to twelve months of imprisonment on each count of conviction, the sentences to run concurrently, fifty dollar special penalty assessment on each count.

The Court of Appeals held that the District Court's interpretation of the intent requirement of 18 U.S.C. § 1954 was correct in that the "because of" prong of the statute requires no showing of specific intent for liability. As discussed, *infra*, this holding is premised upon the Court's improperly distinguishing the statutory interpretation standards of *Liparota v. United States*, 471 U.S. 419 (1985) (absent explicit and unambiguous contrary legislative intent, strong presumption that government must prove defendant knew conduct wrongful).

---

[1] Section 1954, in relevant part, prohibits the receipt by any agent of an employee pension plan of money "because of or with intent to be influenced with respect to any of his actions."

The Court of Appeals further affirmed the embezzlement conviction against petitioner (then appellant) Soares' challenge on sufficiency of evidence grounds, noting that the increased contract amount at issue had been represented by petitioner contemporaneously as consulting fees, but, at trial, as reimbursement for out-of-pocket expenses. As discussed, *infra*, the Appeals Court ignored the *undisputed* evidence of reimbursement.

B. Factual Summary

1. Allegations of the Indictment

The Indictment alleged that petitioner Soares operated an investment management firm known as Tamarack Associates ("Tamarack") which, among other activities, managed the assets of the Sacramento Independent Hotel, Restaurant and Tavern Employees Pension Trust Fund ("Sacramento Pension Trust"), a fund governed by the requirements of the Employee Retirement Income Security Act ("ERISA"). At that time, petitioner also served as the general manager in certain limited partnerships designed to develop real estate projects, including projects known as the Casa Vista and Laine Hill developments. CR 1 at 1-7.[2]

The Indictment further alleged that from October 1984 through May 1986, petitioner "engaged in an ongoing scheme to use Sacramento Pension Trust assets for the

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[2] CR = Clerk's Record on Appeal (by docket number).
RT = Reporter's Transcript on Appeal (by date & page number).

purpose of generating substantial profits for himself and for the purpose of financing and maintaining Tamarack." CR 1 at 6. It also alleged that, *inter alia*, petitioner engaged in the following prohibited acts:

> (1) Using Sacramento Pension Trust funds to purchase undesirable and non-income producing real properties, said purchases often were contingent upon the seller's agreement to invest certain proceeds from the sale into Casa Vista, a limited partnership organized and operated by the defendants and not associated in any way with the Pension Trust; creating a conflict of interest in the relationship of the defendants with the Sacramento Pension Trust.
>
> (2) Misappropriating Sacramento Pension Trust funds for the purchase of furnishings, appliances, and other items for the personal use and benefit of the defendant.

CR 1 at 6-7.

Counts One through Four of the Indictment alleged that, in four separate transactions, petitioner received money and other value "because of" actions undertaken by Tamarack on behalf of the Sacramento Pension Trust. CR 1 at 7-9. Those Counts allege that petitioner received two types of prohibited benefit. First, in each of those transactions, Tamarack, on behalf of the Sacramento Pension Trust, purchased property from a seller who, as a condition of the original sale, invested some or all of the proceeds received from the Sacramento Pension Trust into petitioner's Casa Vista project. Second, in some of those transactions, petitioner received fees from the sellers of the property. Both the benefit of the seller's

investment into a property in which petitioner had an interest and the direct payments to petitioner by the sellers were alleged to have taken place in violation of the fiduciary requirements set forth in 18 U.S.C. § 1954. *Id.*

Count Seven alleged that petitioner received approximately $20,757 in a kickback payment from a contractor in relation to petitioner's work for the Sacramento Pension Trust.

2. Evidence at Trial

a. 18 U.S.C. § 1954

Petitioner stipulated to the underlying factual basis regarding the transactions at issue in Counts One through Four. RT 2/10/92 at 4-7. In particular, he stipulated that he had structured those transactions so that the sellers of the various properties to the Sacramento Pension Trust would in turn reinvest some or all of the proceeds into the Casa Vista project, of which he was the general partner. Additionally, he stipulated that he received payments from the sellers of certain of those properties. CR 108-109.

Petitioner's intended defense to Counts One through Four, which he presented in the form of an extensive Offer of Proof, involved the advice of counsel. RT 2/10/92 at 1-14. Specifically, petitioner would have presented a defense showing that the structure of the transactions charged in Counts One through Four was brought to the attention of his attorneys and was approved by those attorneys. CR 105 at 2-8. Petitioner was precluded

from presenting this defense by the District Court's ruling on his *in limine* motion regarding the intent requirements under 18 U.S.C. § 1954. CR 55; RT 2/3/92 at 4-5; RT 2/10/92 at 1-14.

b. 18 U.S.C. § 664

(1) Government Evidence

The government's summary of evidence on the embezzlement count, relied upon by the District Court, discussed four relevant witnesses.

Fernando Oliveira was the owner of Oliveira Construction Company and would testify that he did considerable construction work for petitioner that was paid for by pension fund monies. Mr. Oliveira would also testify that his wife, Sharon Oliveira, was the company bookkeeper and financial operator. Finally, Mr. Oliveira could testify to details of the financial transaction with petitioner as a supplement to his wife's testimony. CR 109 at 24-25.

Sharon Oliveira handled the financial side of the business and managed the office. CR 109 at 25. She did not know the reason for the addition of $20,757.92 to a contract that was to be returned to petitioner. *Id.* at 26. Before she would make an entry into the company books, she wanted an explanation for the purpose of the additional amount. *Id.* She was advised the additional amount was for consulting fees for petitioner. *Id.* at 26-27. She also would testify that her husband's signature on a copy of the new contract was forged and that the copy contained additional contract language. *Id.* at 27-28.

Lynetti Grippi was the secretary for petitioner at Tamarack Associates. CR 109 at 28. She discussed the increased amount with Sharon Oliveira, who demanded a bill for the additional fees. Grippi prepared a new statement at petitioner's request, though she found it unusual. *Id.* She sent the new bill to Oliveira and received a $20,757.92 check that went into petitioner's personal checking account, not Tamarack's commercial account. *Id.*

In addition, the government's summary of evidence listed Dennis Hammond, a member of the pension fund board, who would testify that petitioner was not expected to inflate billings to receive additional compensation such as the Oliveira contract and the board would not have approved of such a transaction. CR 109 at 36-37.

(2) Defense Evidence

Petitioner's Offer of Proof included his explanation that the $20,757.92 that he received was for reimbursement for monies that he had advanced to purchase art work and furnishings for a renovated apartment. CR 105 at 14-16. He ordered approximately $5,700 of art work from C.G. Rein Galleries (CR 105 at 14-15; CR 106, Exs. B-1 and E-1 through E-7) and approximately $15,000 in furniture from Breuner's, a furniture store. CR 105 at 15, CR 106, Exs. B-1 and G-1.[3] Petitioner further would have testified that reimbursement for expenses that he incurred were always made slowly by Sacramento Pension Trust, unlike payments made by the Trust to

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[3] The Breuner's employee, Leda Lindsay, remembers that the purchases totaled at least $10,000. CR 106, Ex. G-1.

Oliveira. CR 105 at 15-16. The contract amount was increased by $20,757.92 to approximate the value of the art work and furnishings that petitioner purchased and put into the furnished apartment. *Id.* at 16.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

The opinion of the Court of Appeals in regard to the intent requirement of the ERISA criminal statute conflicts with the decision of this Court in *Liparota v. United States*, 471 U.S. 419 (1985). The District Court committed reversible error by ruling that the "because of" prong of 18 U.S.C. § 1954 requires no showing of specific intent, thereby precluding petitioner Soares from presenting his advice-of-counsel defense and depriving him of his rights to a fair trial, to due process and to present a defense. The District Court, further, committed reversible error in convicting petitioner of embezzlement based upon insufficient evidence.

A. Intent Requirement of 18 U.S.C. § 1954.

In *Liparota v. United States*, 471 U.S. 419 (1985), this Court, relying on the time-honored principles that statutory ambiguity must be resolved in favor of lenity toward a defendant and that criminal statutes requiring no *mens rea* have a "generally disfavored status," *id.* at 426 (quoting *United States v. United States Gypsum Co.*, 438 U.S. 422, 438 (1978)), ruled that courts must enforce the strong presumption that the government must prove that a defendant knew that his conduct was wrongful unless the

legislature "explicitly and unambiguously," *ibid*, indicates a contrary intent.

The Ninth Circuit distinguished *Liparota* on two grounds – (1) that § 1954 is not an ambiguous statute, unlike the statute addressed in *Liparota*, in that it clearly "envisioned a two-pronged liability scheme," and (2) again unlike *Liparota*, there existed a clear expression of Congressional intent, *viz.*, to reach all fiduciaries who profit "because of" their position. *United States v. Soares*, 998 F.2d 671, 673 (9th Cir. 1993).

The language of the statute and the relevant legislative history cannot, however, be characterized as unambiguous as to the *mens rea* requirement. The District Court's interpretation, affirmed by the Appeals Court, renders the "with intent to be influenced" prong of the so-called "two-pronged liability scheme," *id.* at 673, wholly superfluous,[4] and the entire "scheme" absurd. It cannot fairly be said, indeed, it is absurd on its face to say, that the statutory language evinces an unambiguous Congressional intent to create a single offense with a single penalty structure which, at one and the same time, does and does not require *mens rea*.

Moreover, Congressional intent in the legislative history is not so clear-cut as to preempt the application of the presumption of *mens rea*. Indeed, what clarity that

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[4] Just as in the statute addressed in *Liparota*, the Government may avoid having to prove any *mens rea* merely by bringing the prosecution under the "prong" most favorable to it. To paraphrase *Liparota*, if Congress wanted to require the Government to prove specific intent in some, but not all, § 1954 prosecutions, it chose a peculiar way to do so. *Id.* at 429-430.

does appear militates against the interpretation of the District Court. *See* H.R. Rep. No. 998, 87th Cong., 1st Sess. 7, *reprinted in* 1962 U.S. Code Cong. & Admin. News 1532, 1532-1536, at 7 (bill to address "kickbacks [and] certain other conflict-of-interest payments and receipts, *designed to influence certain actions of the giver or receiver . . .* ") (emphasis added). Certainly nothing that appears in the official statements of legislative intent explicitly suggests that the "because of" language was designed to exclude a specific intent requirement from Section 1954. *See* H.R.Rep. No. 998, *supra*; S.R. Rep. No. 908, 87th Cong., 1st Sess. (1962); Conf. Rep. No. 1417, 87th Cong., 2nd Sess., *reprinted in* 1962 U.S. Code Cong. & Admin. News 1532, 1532-54.[5]

B. Sufficiency of the Evidence of Embezzlement

The government presented no evidence to contest that petitioner spent the approximate $20,757.92 amount on art work and furnishings and that he was entitled to reimbursement. The government presented no evidence from any witness that the $20,757.92 amount was intended to be or was a kickback to petitioner. Indeed, neither Fernando nor Sharon Oliveira stated that the

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[5] The Court of Appeals cited three cases in support of its decision. Two of the cases, *United States v. Friedland*, 660 F.2d 919 (3rd Cir. 1981), *cert. denied*, 456 U.S. 989 (1982), and *United States v. Romano*, 684 F.2d 1057 (2nd Cir.), *cert. denied*, 456 U.S. 944 (1982), were decided prior to *Liparota*. The third, *United States v. Pieper*, 854 F.2d 1020 (7th Cir. 1988), did not address the impact of *Liparota* on the § 1954 *mens rea* issue.

monies were a kickback. In light of the uncontested evidence of petitioner's out-of-pocket expenses, no reasonable inference could be drawn from the evidence presented that the additional monies were a kickback.

The government's theory of prosecution was that the entire amount was a kickback; that is what the indictment charged, the government argued and the District Court found. In order to so find, however, the District Court had not only to disbelieve petitioner, but had to entirely ignore the undisputed evidence of the purchase of art work and furnishings put into the furnished apartment by petitioner.

On the sufficiency of the evidence issue, the task of the Court of Appeals was to determine

> whether the government produced sufficient circumstantial evidence to permit a rational trier of fact to conclude, beyond a reasonable doubt, that appellants acted with specific intent to deprive the trust beneficiaries of trust funds; that is, that appellants were sufficiently aware of the facts to know that they were acting wrongfully and contrary to the trust placed in them by the pension fund beneficiaries.

United States v. Ford, 632 F.2d 1354, 1362 (9th Cir. 1980), *cert. denied*, 450 U.S. 934 (1981). The government adduced insufficient evidence upon which to predicate a finding beyond a reasonable doubt that petitioner lacked a good faith belief that the funds were spent for the benefit of the pension fund. *See, United States v. Tham*, 665 F.2d 855, 858 (9th Cir. 1981), *cert. denied*, 456 U.S. 944 (1982) (interpreting 29 U.S.C. § 501(c) – embezzlement of union assets statute). Looking at all the evidence, no rational trier of

fact could have found petitioner guilty beyond a reasonable doubt, given the undisputed evidence of reimbursement for out-of-pocket expenses.

CONCLUSION

This petition presents serious issues about (1) the need to apply the presumption of *mens rea* in interpreting the "because of" prong of the ERISA criminal statute and (2) the need to assess the sufficiency of the evidnce upon which petitioner's embezzlement conviction was predicated.

For all the foregoing reasons, this Court should grant the petition for certiorari and reverse the judgment of the Court of Appeals for the Ninth Circuit.

DATED: December 17, 1993

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. PAUL F. SOARES, *Defendant-Appellant.*	No. 92-10574 D.C. No. CR-90-20074-JW OPINION

Appeal from the United States District Court
for the Northern District of California
James Ware, District Judge, Presiding

Argued and Submitted
June 17, 1993 – San Francisco, California

Filed July 6, 1993

Before: Thomas E. Fairchild,*
Robert R. Beezer, and Charles Wiggins,
Circuit Judges

Opinion by Judge Wiggins

SUMMARY

*Hon. Thomas E. Fairchild, Senior United States Circuit Judge for the 7th Circuit Court of Appeals, sitting by designation.

Criminal Law and Procedure/Criminal Acts/Due Process

The court of appeals affirmed a district court judgment of conviction. The appellate court held that a statute that provided criminal liability for one receiving any thing of value "because of" his actions, decisions, or duties as fiduciary of an ERISA plan did not require knowing violation by a defendant to obtain his conviction.

Appellant Paul Soares contracted with an ERISA-qualified pension plan to become its investment adviser. Soares caused the plan to purchase certain real estate, conditioning the purchases on the seller's agreement to invest a portion of the proceeds in a real estate development limited partnership that Soares controlled. Soares also received broker's commissions on the plan's real estate purchases.

Soares had a construction company do renovation work on an apartment owned by the plan. The cost was $64,000. Soares sent the contractor a fee statement for $85,000, which was the amount paid for the work by the plan. After payment by the plan, the contractor sent Soares a check for the excess, which Soares deposited in his personal account. Soares justified the excess to the contractor as a consulting fee, but when no one, including an employee of Soares's, could corroborate his consultancy, he testified at trial that it was reimbursement for furniture he had purchased for the apartment.

Soares was indicted for taking kickbacks and for embezzlement. He was convicted after a bench trial. On appeal, he contended that the kickback statute required

proof of his specific intent, and that the evidence did not support his embezzlement conviction.

[1] 18 U.S.C. Section 1954 provides that one in Soares's position with respect to the plan who receives any thing of value because of or with intent to be influenced with respect to his actions, decisions, or duties relating to the plan is criminally liable. [2] In that section, Congress unambiguously indicated a two-pronged liability scheme, one prong of which requires only Soares's acceptance of a thing of value because of his position as fiduciary. [3] In the section, Congress expressed its intent to reach all fiduciaries who profit as a result of their decisions to invest plan funds. Such a broad purpose indicates that such fiduciaries do not have to know that their conduct is illegal.

[4] Viewing the evidence in the light most favorable to the prosecution, it could not be said that any rational trier of fact could not find the essential elements of Soares's embezzlement beyond a reasonable doubt.

COUNSEL

Marcus S. Topel, Daniel F. Cook and Stephen N. Adams, Topel & Goodman, San Francisco, California for defendant-appellant.

Robert K. Crowe, Assistant United States Attorney, San Francisco, California for plaintiff-appellee.

OPINION

WIGGINS, Circuit Judge:

On June 13, 1990, a federal grand jury returned a seven count indictment against defendant Paul Fairfax Soares. The indictment charged Soares with four counts of having received kickbacks "because of" his fiduciary position as the investment advisor for an employee pension plan, in violation of 18 U.S.C. § 1954 (counts one through four), and with three counts of embezzling money from the same employee pension plan, in violation of 18 U.S.C. § 664 (counts five through seven). After waiving his right to a jury trial, Soares was convicted on counts one through four and on count seven. Soares now appeals. The district court had jurisdiction pursuant to 28 U.S.C. § 3231. We have jurisdiction over this timely appeal pursuant to 28 U.S.C. § 1291. We affirm.

I. Facts

Soares controlled a business known as Tamarack Associates ("Tamarack"). On June 1, 1984, Soares and Tamarack entered into a written agreement with the Sacramento Independent Hotel, Restaurant and Tavern Employees Pension Trust ("the Pension Fund"), which was an employee pension plan governed by the Employee Retirement Income Security Act of 1974 ("ERISA"). The agreement made Tamarack the investment advisor for the Pension Fund and thereby gave Soares the authority to control the Pension Fund's total investment portfolio.

While Soares was acting, through Tamarack, in a fiduciary capacity for the Pension Fund, he also controlled another business known as the Casa Vista Limited Partnership ("Casa Vista"), whose purpose was to develop certain parcels of real property. Casa Vista and Tamarack shared the same business address.

In June of 1985, Soares caused the Pension Fund to purchase four parcels of real estate. Counts one through four of the indictment against Soares charged that he conditioned the purchase upon the seller's agreement to invest a substantial portion of the sale proceeds in Casa Vista and also ensured that he received broker's commissions, both in violation of 18 U.S.C. § 1954.

Soares does not dispute the factual allegations of counts one through four. Instead, Soares claims he believed his actions were "entirely legal" and, in fact, were taken on the advice of his attorney. Soares appeals the district court's holding that 18 U.S.C. § 1954 does not require the government to show specific intent – an interpretation that Soares contends prevented him from offering his advise of counsel defense.

Soares also appeals on sufficiency of evidence grounds his conviction on count seven, the 18 U.S.C. § 644 embezzlement charge. We discuss each issue in turn.

II. Discussion

A. *18 U.S.C. § 1954*

[1] Under 18 U.S.C. § 1954, a person in Soares position with respect to the Pension Fund who

> receives or agrees to receive or solicits any fee, kickback, commission, gift, loan, money, or thing of value *because of* or *with intent to be influenced with respect to*, any of his actions, decisions, or other duties relating to any question or matter concerning such plan . . . shall be fined not more than $10,000 or imprisoned not more than three years, or both. . . .

18 U.S.C. § 1954 (1988) (emphasis added). Before the district court, Soares argued that the "because of" prong of this statute requires proof that the "defendant knew his acts were prohibited by law" and that "the government demonstrates *mens rea* under the 'because of' clause only where it shows that a defendant knew his acts were prohibited by law." The district court rejected these arguments:

> I think that the language of the statute . . . clearly evidences an intent to make the receipt of money 'because of' a position as a trustee illegal. Therefore, the court's intended decision is to deny the request that the court infer some other mental element than that which is from the face of the statute.

Thus, the district court required a showing only that Soares received a "thing of value" *because of* his actions, duties, or decisions relating to the Pension Fund, not that he *knew* such receipt to be illegal. Soares challenges this interpretation of § 1954 as erroneous. We review de novo the district court's interpretation of 18 U.S.C. § 1954. *See United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824 (1984).

Three other circuits previously have addressed this very issue, and each has agreed with the district court's

interpretation. *See, e.g., United States v. Pieper,* 854 F.2d 1020 (7th Cir. 1988); *United States v. Romano,* 684 F.2d 1057 (2d Cir.), *cert. denied,* 459 U.S. 1016 (1982); and *United States v. Friedland,* 660 F.2d 919 (3d Cir. 1981), *cert. denied,* 456 U.S. 989 (1982). In *Pieper,* for example, the Seventh Circuit resisted the defendant's attempts to require the government to show specific intent under the "because of" prong of § 1954.

> [Defendant's] assertion that "he did not accept any renumeration [sic] to influence his actions with respect to any matters pending before the Fund's Board," a defense against the "intent" prong of § 1954, even if true, is irrelevant to a determination of whether the evidence was sufficient to support his conviction under the "because of" prong.

Pieper, 854 F.2d at 1024.

Similarly, in *Romano,* the Second Circuit rejected the defendant's contention that § 1954 did not reach his acceptance of television sets from a bank as gifts for opening accounts as trustee of a union pension fund.

> [T]he statute punishes the receipt of any of these things [of value] either "because of," or "with the intent to be influenced" with respect to, any action or decision concerning a pension fund. If only corrupt transactions were intended to be covered, Congress would not have added the "because of" clause, but would have limited the statute to those possessing the intent to be influenced.

Romano, 684 F.2d at 1064 (footnote omitted).

Finally, in *Friedland*, the Third Circuit rejected the defendants' claim that, in order to come under the "because of" prong of § 1954, they must have been shown actually to have taken some action in return for the kickbacks.

> If actual exercise of influence were a prerequisite to a violation, then anyone who could potentially influence a future decision concerning a pension plan would be free to solicit kickbacks so long as he ultimately took no action to influence the decision. Such a construction is inconsistent with the broad purpose of § 1954.

Friedland, 660 F.2d at 927.

Nonetheless, Soares urges us to reject the reasoning of these courts based on *Liparota v. United States*, 471 U.S. 419 (1985),[1] particularly its statements that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity," *id.* at 427 (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)), and "criminal offenses requiring no *mens rea* have a 'generally disfavored status.' " *Id.* at 426 (quoting *United States v. United States Gypsum Co.*, 438 U.S. 422, 438 (1978)).

[2] However, we conclude that *Liparota* does not control here. First, by its own terms, *Liparota* applies only in cases where the statute at issue is ambiguous as to the *mens rea* requirement. *Id.* at 425 ("Absent indication of

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[1] *Liparota* specifically addressed the extent to which the word "knowingly" modifies successive verbs in a criminal statute, namely 7 U.S.C. § 2024(b)(1). We have applied *Liparota* in that general context. *See, e.g., United States v. Speach*, 968 F.2d 795, 796 (9th Cir. 1992) (applying *Liparota* to the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(d)(1)).

contrary purpose in the language or legislative history of the statute, we believe that [statutes] require [ ] a showing that the defendant knew his conduct to be unauthorized by statute or regulations."). Section 1954 is not such a statute. In *Liparota*, the statute was ambiguous because it was unclear what the antecedent "knowingly" modified. In § 1954, however, Congress unambiguously indicated that it envisioned a two-pronged liability scheme: A fiduciary who accepts a thing of value "because of" his position *or* "with intent to be influenced with respect to any of his actions" is criminally liable.

[3] Second, we point out that in *Liparota*, the Supreme Court was concerned that a contrary interpretation of the *mens rea* requirement could criminalize apparently innocent conduct. *Liparota*, 471 U.S. at 426 ("This construction is particularly appropriate where, as here, to interpret the statute otherwise would be to criminalize a broad range of apparently innocent conduct."). In § 1954, however, Congress expressed its intent " 'to reach all fiduciaries who profit (other than by regular compensation) as a result of their decisions to invest union pension funds.' " *Pieper*, 854 F.2d at 1025 (quoting *Romano*, 684 F.2d at 1064, and citing S.Rep. No. 908, 87th Cong., 1st Sess., 4-5, 11 (1961)). The broad purpose of the statute indicates that these fiduciaries do not have to *know* their conduct to be illegal.

Accordingly, we find *Liparota* inapposite and join the Second, Third, and Seventh Circuits in interpreting § 1954 as envisioning a dual liability scheme, one prong of which (the "because of" prong) requires no showing of specific intent for liability. The district court properly interpreted the statute.

B. *Sufficiency of the Evidence*

Soares also challenges on sufficiency of evidence grounds his conviction on count seven, embezzlement under 18 U.S.C. § 664.[2] There is sufficient evidence to support a conviction if, " 'reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " *United States v. Bishop*, 959 F.2d 820, 829 (9th Cir. 1992) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The same test applies to both jury and bench trials. *United States v. Mayberry*, 913 F.2d 719, 721 (9th Cir. 1990); *United States v. Spears*, 631 F.2d 114, 117 (9th Cir. 1980).

With regard to count seven, both the defendant and the prosecution stipulated that the defendant's guilt or innocence would be determined from the Government's Summary of Evidence, the Defendant's Offer of Proof, and documents presented at trial. The Government's Summary of Evidence showed that Soares retained Oliviera Construction Company to renovate an apartment owned by the Pension Fund. Originally, the work was to cost approximately $50,000, but additional costs increased the amount of the job to just over $64,000. Soares and Oliviera Construction subsequently agreed to this new price and established a payment schedule.

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[2] 18 U.S.C. § 664 provides, in pertinent part, that
Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use or to the use of another, any of the moneys, funds . . . or other assets of any . . . employee pension benefit plan . . . shall be fined not more than $10,000, or imprisoned not more than five years, or both.

Shortly thereafter, Soares instructed one of his Tamarack employees, Lynette Grippi, to call Oliviera Construction Company and request that a new contract be created to reflect that the original contract was for $85,000, not $64,000. This new contract was to reflect the original contract date of August, 1985. When Oliviera Construction Company balked, Soares personally sent them a fee statement that included the additional $20,000. After Oliviera Construction Company received payment from the Pension Fund, it sent Soares a check for the $20,000, which he then deposited in his personal account.

[4] Originally, to Oliviera Construction Company, Soares justified the $20,000 as a consulting fee. However, no one connected with Soares' various machinations with respect to the contract, including Lynette Grippi, knew of any consulting services provided by Soares. Moreover, at trial Soares abandoned this position and claimed that the $20,000 was to reimburse him for furniture he had purchased for the Pension Fund's apartment. This was the nature of the Defendant's Offer of Proof. However, the trial court found that the evidence did not sustain Soares' explanation and that his defense was not credible. Respecting this as properly the role of the trier of fact, *see United States v. Vasquez*, 858 F.2d 1387, 1391 (9th Cir. 1988), *cert. denied*, 488 U.S. 1034 (1989), and viewing the evidence in the light most favorable to the prosecution, we cannot say that any rational trier of fact could not find the essential elements of a violation of § 664 beyond a reasonable doubt. This is not a close case.

AFFIRMED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	No. 92-10574
Plaintiff-Appellee,	D.C. No. CR-90-20074-JW
v.	
PAUL F. SOARES,	ORDER
Defendant-Appellant.	(Filed Sept. 20, 1993)

Before: FAIRCHILD,* BEEZER, and WIGGINS, Circuit Judges

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc hearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

* Hon. Thomas E. Fairchild, Senior United States Circuit Judge for the 7th Circuit Court of Appeals, sitting by designation.

UNITED STATES DISTRICT COURT
NORTHERN District of CALIFORNIA

UNITED STATES OF AMERICA

V.

PAUL FAIRFAX SOARES

(Name of Defendant)

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed Prior to November 1, 1987)

Case Number:
CR-90-20074 JW

MARCUS S. TOPEL ESQ
Defendant's Attorney

THE DEFENDANT:

[ ] pleaded guilty to count(s)_____.

[XX] was found guilty on count(s) ONE(1), TWO(2), THREE(3), FOUR(4) and SEVEN(7) after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. §1954	Offer,Acceptance or solicitation to influence operations of employee pension plan	3/19/92	1,2,3, & 4
18 U.S.C. §664	Theft or embezzlement from employee Pension Plan	3/19/92	7

[ ] The defendant has been found not guilty on count(s)_____, and is discharged as to such count(s).

[XX] Count(s) FIVE(5) AND SIX(6) (~~is~~)(are) dismissed on the motion of the United States.

IT IS THE JUDGMENT OF THIS COURT THAT: The defendant is hereby committed to the custody of the Bureau of Prisons for a term of TWELVE(12) MONTHS on each of COUNTS ONE(1), TWO(2), THREE(3), FOUR(4) AND SEVEN(7) to run concurrently with each other for a total term of Twelve Months.

IT IS FURTHER ORDERED, that the defendant be given a stay of execution of sentence until April 02,1992, at which time he is to report directly to the institution designated by the Bureau of Prisons.

IT IS FURTHER ORDERED, that the appearance bond if any is exonerated upon the defendant's compliance with the above voluntary surrender order;

CONDITIONS OF PROBATION

While the defendant is on probation pursuant to this judgment, the defendant:

1) shall not commit another federal, state or local crime;

2) shall not leave the judicial district without the permission of the court or probation officer;

3) shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

4) shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

5) shall support his or her dependents and meet other family responsibilities;

6) shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

7) shall notify the probation officer within seventy-two hours of any change in residence or employment;

8) shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

9) shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

10) shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

11) shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

12) shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

13) shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

14) as directed by the probation officer, shall notify third parties of risks that may be occasioned by defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

15) shall pay any fine or obligation imposed by this judgment.

16) shall not possess a firearm or destructive device.

[X] IT IS FURTHER ORDERED that the defendant shall pay a special assessment of $ 250.00, for count(s) 1,2,3,4 & 7, which shall be due [X] immediately [ ] as follows: CLERK,UNITED STATES DISTRICT COURT 280 SO. FIRST STREET RM.2112,SAN JOSE, CA. 95113

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

[ ] The court orders commitment to the custody of the Attorney General and recommends:

Defendant's Soc. Sec. No.:
564-74-5069

Defendant's Date of Birth:
02-10-50

Defendant's Mailing Address:

3121 STEVENSON ROAD

PEBBLE BEACH, CA.93953

Defendant's Residence Address:

SAME AS ABOVE

SEPTEMBER 02, 1992
Date of Imposition of Sentence

/s/ James Ware
Signature of Judicial Officer

JAMES WARE,U.S. DISTRICT JUDGE
Name & Title of Judicial Officer

SEPTEMBER 02, 1992
Date

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ at _____ with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy Marshal

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs. PAUL F. SOARES, Defendant.	Case No. CR 90-20074 JW **FINDINGS OF FACT AND CONCLUSIONS OF LAW** (Filed March 19, 1992)

This case was tried by the Court sitting without a jury pursuant to Rule 23(c), Fed. R. Crim. P. With the consent of his counsel, the defendant waived his right to a jury trial. The government also consented to trial without a jury.

Prior to trial, the parties stipulated to the following:

1. With respect to Counts 1-4, the Court could make a factual determination concerning the defendant's guilt or innocence on the basis of the factual statements and the materials submitted by the government entitled "Government's Summary of Evidence Supporting the Guilt of Defendant as Alleged in Counts 1-7 of Indictment," including Exhibits 1-28;

2. With respect to Count 7, defendant's guilt or innocence would be determined from the Government's Summary of Evidence referred to in Paragraph 1 above, including Exhibits 46-51 and from the materials submitted by the defendant entitled "Defendant's Offer of

Proof" at pages 12-16, and from documentary evidence submitted at the trial, specifically Exhibits J1-3 and K1;

3. That to the extent there are factual disputes presented by the materials submitted, the Court may resolve those factual disputes and make findings of fact based on the materials without the need to call witnesses; and,

4. Counts 5 and 6 would be dismissed on motion of the government without prejudice to the right of the government to restate those counts in the event of any post appeal retrial of the case.

Based on the stipulations, materials submitted to the Court, arguments of counsel, and good cause appearing, the Court finds and determines the following beyond a reasonable doubt:

FINDINGS OF FACT

1. The Sacramento Independent Hotel, Restaurant and Tavern Employees Pension Trust (the "Trust") is a trust governed by the Employee Retirement Income Security Act of 1974, ("ERISA").

2. The defendant, Paul Fairfax Soares, was the control person of a business known as Tamarack Associates. Tamarack did business as a California General Partnership.

3. On June 1, 1984, the trustees of the Trust entered into an agreement with Tamarack Associates. Under the terms of the agreement, Tamarack Associates agreed to act as an investment advisor for the Trust. Defendant Soares was given the power and authority under guidelines issued by the trustees of the Trust to purchase and

sell securities and transfer assets in the investment portfolio of the Trust.

4. Under the terms of the agreement, Tamarack Associates agreed to serve as a fiduciary to the Trust within the meaning of ERISA.

5. There were subsequent amendments to the agreement which did not alter the fiduciary obligations of Tamarack Associates toward the Trust.

6. At the same time as defendant served as officer and control person of Tamarack Associates, he also served as control person in other business enterprises. One such enterprise was Casa Vista Limited Partnership. Casa Vista was in the business of development, purchase, renovation and sale of real property. Casa Vista offered limited partnership investment units for sale.

7. As alleged in Count 1 of the Indictment, on June 14, 1985, on behalf of the Trust and with Trust funds and the funds of other pension funds managed by him, defendant purchased real estate at 123 Littlefield Road, Monterey, California. Defendant expressly conditioned the purchase upon an agreement that the seller kickback $40,000 of the proceeds as an investment in Casa Vista limited partnership units. In addition, Tamarack Associates collected a $1,100 fee for the transaction.

8. As alleged in Count 2 of the Indictment, on June 25, 1985, on behalf of the Trust and with Trust funds, defendant purchased property at 363 Spencer, Monterey, California. Defendant expressly conditioned the purchase on an agreement that the seller kickback $100,000 of the

proceeds as an investment in Casa Vista limited partnership units. The Spencer property was in financial distress and was purchased "As is" without the benefit of inspection for termites or dry rot.

9. As alleged in Count 3 of the Indictment, on June 27, 1985, on behalf of the Trust and with Trust funds, defendant purchased a vacant lot at Colton and Pelican Road, Pebble Beach, California. Defendant expressly conditioned the purchase upon an agreement that the seller kickback $55,000 of the proceeds as an investment in Casa Vista limited partnership units.

10. As alleged in Count 4 of the Indictment, on June 27, 1985, on behalf of the Trust and with Trust funds, defendant purchased real estate at 263 Lighthouse Avenue, Pacific Grove, California. Defendant expressly conditioned the purchase upon an agreement that the seller kickback $40,000 of the proceeds as an investment in Casa Vista limited partnership units.

11. As alleged in Count 7 of the Indictment, in January, 1986, on behalf of the Trust, defendant entered into a contract with Oliveria Construction. Oliveria agreed to renovate a duplex owned by the Trust for the sum of $50,000, later increased to $64,242.08 to be paid from Trust funds. In February, 1986, defendant prepared a false substitute contract incorrectly reflecting that the contract price was $85,000. Defendant directed Oliveria to kickback to defendant the additional $20,757.92 when funds were dispersed from the Trust to pay Oliveria. The purpose of the substitute contract was to permit defendant to take $20,757.92 of Trust funds for his own personal use. On March 17, 1986, pursuant to the

arrangement with Oliveria, defendant did receive a kick-back of $20,757.92. Defendant offered an explanation for the admitted taking of the $20,757.92 by saying that the funds were used for reimbursement to defendant for furniture he had purchased for the Trust. The evidence does not sustain defendant's explanation. The Court finds the defense not credible.

CONCLUSIONS OF LAW

1. The Trust is an employee benefit plan pension governed by ERISA.

2. The defendant, Paul Fairfax Soares, pursuant to 29 U.S.C. Section 1104 is an officer and employee of an organization which provides benefit plan services to an ERISA plan and a fiduciary, required to discharge his duties for the exclusive purpose of providing benefits to the Trust and its beneficiaries. As set forth in paragraph 1-11 above, the defendant solicited and accepted fees and kickbacks because of and with the intent to be influenced with respect to his actions and decisions and other duties relating to matters concerning an ERISA plan.

IT IS SO ORDERED.

Dated: 3/19/92

/s/ James Ware
HONORABLE JAMES WARE
United States
District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs. PAUL F. SOARES, Defendant.	Case No. CR 90-20074 JW **JUDGMENT** (Filed Mar. 19, 1992)

1. With respect to the charges in Count One of the Indictment, the Court finds beyond a reasonable doubt the defendant guilty of soliciting, receiving and agreeing to receive a fee, kickback in value, in violation of Title 18 U.S.C., section 1954 and section 2.

2. With respect to the charges in Count Two of the Indictment, the Court finds the defendant guilty beyond a reasonable doubt of soliciting, receiving and agreeing to receive a fee, kickback in value, in violation of Title 18 U.S.C., section 1954.

3. With respect to the charges in Count Three of the Indictment, the Court finds the defendant guilty beyond a reasonable doubt of soliciting, receiving and agreeing to receive a fee, kickback in value, in violation of Title 18 U.S.C., section 1954.

4. With respect to the charges in Count Four of the Indictment, the Court finds the defendant guilty beyond a reasonable doubt of soliciting, receiving and agreeing to receive a fee, kickback in value, in violation of Title 18 U.S.C., section 1954.

5. With respect to the charges contained in Count Seven, the Court finds the defendant guilty beyond a reasonable doubt of embezzling, stealing and unlawfully converting to his own use, money, funds and property of the Trust in violation of Title 18 U.S.C., section 664.

The case is referred to the Adult Probation Department for purposes of preparing a presentence report. Sentencing shall be heard on June 17, 1992.

IT IS SO ORDERED.

Dated: 3/19/92

/s/ James Ware
HONORABLE JAMES WARE
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
NORTHERN DIVISION

UNITED STATES OF AMERICA, PLAINTIFF, V. PAUL F. SOARES, DEFENDANT.	CR-90-20074 SAN JOSE, CALIFORNIA JUNE 26, 1991 9:00 A.M.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JAMES WARE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:
OFFICE OF THE U.S. ATTORNEY
BY: ROBERT LOUIS DONDERO
BOX 36055
450 GOLDEN GATE AVENUE
SAN FRANCISCO, CALIFORNIA
94102

FOR THE DEFENDANT:

TOPEL & GOODMAN
BY: DANIEL COOK
STEPHEN N. ADAMS

832 SANSOME STREET
FOURTH FLOOR
SAN FRANCISCO, CALIFORNIA
94111

OFFICIAL COURT REPORTER:
IRENE L. RODRIGUEZ, C.S.R.
CERTIFICATE NUMBER 8074

* * *

[P.15] THE COURT: WELL, I THINK THAT THE LANGUAGE OF THE STATUTE IS CLEAR TO ME BY USING TERMS LIKE KICKBACKS, ISSUED THE DESCRIPTION OF THE FEES AND FUNDS THAT ARE RECEIVED, THAT IT CERTAINLY, TO ME, CLEARLY EVIDENCES AN INTENT TO MAKE THE RECEIPT OF MONEY "BECAUSE OF" A POSITION AS A TRUSTEE ILLEGAL. THEREFORE, THE COURT'S INTENDED DECISION IS TO DENY THE REQUEST THAT THE COURT INFER SOME OTHER MENTAL ELEMENT THAN THAT WHICH IS FROM THE FACE OF THE STATUTE. WE'RE OFF THE RECORD FOR A MOMENT.

* * *

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. PAUL F. SOARES, Defendant.	CASE NO. C 90 20074 JW ORDER RE. DEFINITION OF INTENT FOR A VIOLATION OF 18 U.S.C. § 1954 (Filed June 28, 1991)

Defendant Paul Soares is charged in Counts 1 through 4 of the instant indictment with four violations of 18 U.S.C. § 1954. That statute punishes any trustee of an employee pension benefit plan who "receives or agrees to receive or solicits any fee, kickback, commission, gift, loan, money, or thing of value *because of or with intent to be influenced with respect to,* any question or matter concerning such plan. . . . " 18 U.S.C. § 1954 (emphasis added). Soares exercised authority, control, and discretion over the total investment portfolio of the Sacramento Pension Trust, an employee pension benefit plan.

Counts 1 through 4 of the indictment charge that defendant received improper payments "because of" his actions on behalf of the trust fund. Defendant seeks a pretrial determination of the intent element of the offense. Defendant argues that the government must prove that defendant accepted a thing of value either with the "intent to be influenced," or with the knowledge that his act was wrongful.

Defendant's first argument was rejected by the courts which have interpreted the "intent" language of § 1954. *United States v. Friedland,* 660 F.2d 919 (3d Cir. 1981), *cert. denied, Friedland v. United States,* 456 U.S. 989 (1982); *United States v. Romano,* 684 F.2d 1057 (2d Cir.), *cert. denied,* 459 U.S. 1016 (1982); *United States v. Pieper,* 854 F.2d 1020 (7th Cir. 1988). The Ninth Circuit has not addressed the issue.

In *United States v. Pieper,* 854 F.2d 1020 (7th Cir. 1988), the court explicitly held that one may be convicted under § 1954 of receiving a thing of value either (a) "because of" *or* (b) with intent to be influenced with respect to" any actions or decisions relating to the plan involved. *Id.* at 1024. The court held that to convict a defendant under § 1954, the government need only establish that the defendant received kickbacks "because of" his status, which gave him at least ostensible authority to exercise influence over the fund's investment decisions. *Id.* at 1025. The court added that collapsing the "because of" and the "intent" prongs of the statute "would fly in the face of Congress' clearly expressed legislative intent 'to reach all fiduciaries who profit (other than by regular compensation) as a result of their decisions to invest union pension funds.' " *Id., quoting U.S. v. Romano,* 684 F.2d at 1064; S.Rep. No. 908, 87th Cong., 1st Sess., 4-5, 11 (1961).

In *United States v. Romano,* 684 F.2d 1057 (2d Cir.), *cert. denied,* 459 U.S. 1016 (1982), the court held that the statute punishes receipt of a thing of value either "because of," or "with the intent to be influenced" with respect to, any action or decision concerning a pension fund. *Id.* at 1064. "If only corrupt transactions were

intended to be covered, Congress would not have added the 'because of' clause, but would have limited the statute to those possessing intent to be influenced." *Id.*

In *United States v. Friedland*, 660 F.2d 919 (3d Cir. 1981), *cert. denied, Friedland v. United States*, 456 U.S. 989 (1982), the court again stated that one may be convicted for receiving a thing of value (a) "because of" or (b) "with intent to be influenced with respect to" any actions, decisions, or other duties relating to the plan involved. *Id.* at 925. The court held that a violation of § 1954 is alleged so long as defendants were fiduciaries to the fund, and received a thing of a value either (a) because of that status, which gave them at least ostensible power to exercise influence, or (b) with the purpose of exercising the influence they either actually or ostensibly had over decisions regarding the fund. *Id.* at 926. When a fiduciary to an employee pension fund accepts a thing of value with the stated purpose of exercising his influence over the fund, then his actions come within the "because of" prong of § 1954. *Id.* at 927.

Defendant next argues that to prove a violation of the "because of" prong of § 1954, the government must prove that defendant knew that his conduct was unauthorized or illegal. Defendant relies on *Liparota v. United States*, 471 U.S. 419 (1985) for this argument. Defendant's reliance on *Liparota* is misplaced. In *Liparota*, the applicable statute required the government to prove the defendant knowingly acquired food stamps in a manner not authorized by law. 471 U.S. at 433. In the instant case, § 1954 does not place upon the government the burden to prove that the defendant had a subjective belief that acceptance of the thing of value was illegal. Instead, what the government

must prove is that the defendant knowingly received a thing of value, because of his status as a trustee of an employee pension benefit plan.

Based on the foregoing, defendant's motion to determine degree of intent required to establish guilt under 18 U.S.C. § 1954 is denied.

IT IS SO ORDERED.

DATED: June 27, 1991

/s/ James Ware
JAMES WARE
UNITED STATES
DISTRICT JUDGE

WILLIAM T. McGIVERN, JR.
United States Attorney

FLOY E. DAWSON
Chief, Criminal Division

ROBERT L. DONDERO
Assistant United States Attorney

450 Golden Gate Avenue,
16th Floor
San Francisco, CA 94102
Telephone: (415) 556-4227

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. PAUL FAIRFAX SOARES, Defendant.	Criminal No: VIOLATION: Title 18 U.S.C. Section 664 – THEFT OR EMBEZZLEMENT FROM EMPLOYEE PENSION PLAN; Section 1954 – OFFER, ACCEPTANCE OR SOLICITATION TO INFLUENCE OPERATIONS OF EMPLOYEE PENSION PLAN (Filed June 13, 1990)

INDICTMENT

INTRODUCTION

1. The Sacramento Independent Hotel, Restaurant and Tavern Employees Pension Trust (Sacramento Pension Trust) is a pension trust established for the welfare of the membership of the Sacramento Independent Hotel,

Restaurant and Tavern Employees Union, located in the City of Sacramento, California. The Sacramento Pension Trust is, and at all times mentioned herein was, a trust organized and operating under the terms of the Trust Agreement dated June 1, 1971, as amended. The Sacramento Pension Trust is governed by ERISA, the Employee Retirement Income Security Act of 1974, and section 302 of the Labor Management Relations Act ("LMRA").

2. The defendant Paul Fairfax Soares, (Paul Soares), during the times relevant to the Indictment, was the proprietor, co-proprietor, general partner, or otherwise responsible officer and manager of the following ventures: Tamarack Associates; Tamarack Investment Counsel, Inc.; Carmel Architectural Group; Casa Vista Limited Partnership; Grovement Term Properties; and Laine Hill Limited Partnership.

3. The trustees of the Sacramento Pension Trust entered into a written Investment Management Agreement with Tamarack Associates on June 1, 1984. This Agreement identified and appointed Tamarack Associates as the Investment Advisor to the Sacramento Pension Trust. As such, the defendant Paul Soares, as a principal of Tamarack Associates, exercised authority, control, and discretion over the total investment portfolio of the Sacramento Pension Trust. The defendant had the authority to wire transfer trust monies and securities into and out of various financial institutions and brokerage houses. The defendant, Paul Soares, acting under a power of attorney, had discretion and authority to execute contracts and other documents, and to enter into agreements on behalf of the Sacramento Pension Trust. Written Investment Guidelines and Objectives ("Investment Guidelines")

were issued to the defendant by the Trustees of the Sacramento Pension Fund. These guidelines set limits on the percentage of total assets that could be committed to any one kind of investment. These Investment Guidelines instructed the defendant to make investments for the exclusive benefit of the Sacramento Pension Trust and it's plan beneficiaries by diversifying assets and minimizing the risk of loss to the total asset portfolio.

4. Under 29 U.S.C. Section 1104, a fiduciary is required to discharge his duties for the exclusive purpose of providing benefits to the pension plan participants and its beneficiaries. A person is a fiduciary under the ERISA legislation to the extent that he or she exercises certain discretion over the assets, gives investment advise, or enjoys discretionary control over the administration of the plan. (Title 29 U.S.C. Section 1002(21)(A)). Under the Investment Management Agreement, Tamarack agreed to act as a fiduciary within the meaning of ERISA.

Title 29, United States Code, Section 1106 prohibits a fiduciary from acting on behalf of a party whose interests are adverse to those of the pension plan in a transaction involving the plan. This statute prohibits any transaction by a fiduciary if he knows or should know that such a transaction involves a direct or indirect benefit to the fiduciary.

5. Under the Investment Guidelines, the trustee was to handle the funds of the Trust to minimize the risk of large losses and therefore investments were to be diversified. Real estate investments were to be no more than 30% of the Trust portfolio. Any real estate investment was to be appraised by a registered independent real estate

appraiser on a periodic basis. Any loans of the Trust portfolio were to have loan terms commensurate with the market conditions and rates at the time the loan is made, and any and all loans on real property shall not be made on any property where existing loans and Sacramento Pension Trust loans exceed 75% of the value of the property. These Investment Guidelines were entered into by the trustees on December 13, 1984; and the defendant PAUL SOARES on December 18, 1984, on the part of Tamarack.

6. As a part of the understanding under the Investment Agreement signed by the parties on June 1, 1984, the Investment Adviser (Tamarack Associates) agreed to serve as a fiduciary to the trustees under the terms of ERISA, namely, to manage, acquire, or dispose of the assets prudently and in full accordance with the standards of duty and responsibility applicable to fiduciaries under ERISA. Specifically, Tamarack agreed to not involve itself in any transactions that were prohibited under Section 406 and 407 of ERISA. (Title 29 U.S.C. Section 1106 and Section 1107 respectively). Section 406 specifically prohibits a fiduciary from dealing with the assets of the Trust in any capacity that creates a conflict of interest with the fiduciary's role as a fiduciary with the Trust.

7. At all times relevant to this Indictment, Tamarack Associates was a California general partnership with its principal place of business in the Eastern District of California. It was located in Stockton and functioned as an investment advisory firm. Tamarack began its operation in December, 1979 and ended in January, 1985. The officers were Paul Soares as an investment advisor, David

Soares as an employee, and Sharon Soares as the bookkeeper. Beginning in January, 1985 Tamarack Associates changed to Tamarack Investment Counsel, Inc., a California corporation and an investment advisory firm. Paul Soares and David Soares served as investment advisors and Sharon Soares was employed as the bookkeeper.

8. At all time relevant to this Indictment, Casa Vista Limited Partnership (Casa Vista) was a California limited partnership. The general partner was Grovemont Term Properties, also a California limited partnership. The general partner of Grovemont was Paul Soares, along with his brother David Soares and the defendant's wife, Sharon Soares. These individuals provided management services to the Grovemont partner through Tamarack Associates, an investment advisory firm registered under the Investment Advisory Act of 1940. The offices of Tamarack, Grovemont, and Casa Vista were all at 1919 Canal Boulevard, Suite C-7, Stockton, California.

9. The purpose of the offering of the Casa Vista limited partnership was to 1) provide funds to enable the Casa Vista Limited Partnership to purchase the property situated at 416 Drake Avenue, Monterey, on which was located a Victorian building of 9400 square feet; 2) to construct two additional building on the property of about 19,450 square feet to consist of twelve (12) apartment suites; 3) to renovate the existing building so that it could consist of twelve (12) apartment units; 4) to operate such project as a rental property for long-term appreciation. The capitalization for Casa Vista consisted of $10,101 from the general partner and $1 million from the limited partners; with 200 units sold at $5000 each.

10. At all times relevant to this Indictment, Laine Hill Limited Partnership (Laine Hill) was a California limited partnership

11. Beginning in or around October 1984, and continuing through May 1986, the defendant engaged in an on-going scheme to use Sacramento Pension Trust assets for the purpose of generating substantial profits for himself and for the purpose of financing and maintaining Tamarack. This scheme included but was not limited to:

a. Using Sacramento Pension Trust funds to purchase undesirable and non-income producing real properties, said purchases often were contingent upon the seller's agreement to invest certain proceeds from the sale into Casa Vista, a limited partnership organized and operated by the defendants and not associated in any way with the Pension Trust; creating a conflict of interest in the relationship of the defendants with the Sacramento Pension Trust.

b. Making substantial loans of Sacramento Pension Trust money to individuals in order to generate cash for and channel money into the limited partnerships Casa Vista and Laine Hill; with said loans in violation of the Sacramento Pension Trust Investment Guidelines in that they were below the market rate and were either unsecured or were secured in violation of the Investment Guidelines.

c. Organizing companies such as Carmel Architecture Group and Fairfax Management so that fraudulent and/or inflated bills and invoices for services allegedly provided the Sacramento Pension Trust on

behalf of the real properties owned by the Sacramento Pension Trust and managed by the defendants.

d. Using Sacramento Pension Trust monies to buy-out the investment interests of other Tamarack clients including Kaiser Farms, Mc Cormick Retirement Plan, and Presidio Hill Group, so that the cash generated from said buy-outs could be used for the limited partnerships Casa Vista and Laine Hill; creating a conflict of interest.

e. Misappropriating Sacramento Pension Trust funds for the purchase of furnishings, appliances, and other items for the personal use and benefit of the defendant.

COUNT ONE (Title 18, United States Code, Section 1954).

The Grand Jury further charges, THAT

On or about June 14, 1985, in the County of Monterey, State and Northern District of California, the defendant,

PAUL FAIRFAX SOARES,

did solicit, receive and agree to receive a fee, kickback, commission, money, and thing of value, that is, approximately $40,000 investment in Casa Vista and additional fees of $1100 from Patrick Daly, because of Tamarack actions, decisions and other duties relating to questions and matters concerning the Sacramento Pension Trust, that is, the purchase of 123 Littlefield Road, Monterey, by the Pension Trust.

All in violation of Title 18 United States Code, Section 1954 and Section 2.

COUNT TWO (Title 18, United States Code, Section 1954)

The Grand Jury further charges, THAT

On or about June 25, 1985, in the County of Monterey, State and Northern District of California, the defendant,

PAUL FAIRFAX SOARES,

did solicit, receive and agree to receive a fee, kickback, commission, money, and thing of value, that it, approximately $100,000 investment in Casa Vista and additional fees from John Giambastiani, because of Tamarack actions, decisions, and other duties relating to questions and matters concerning the Sacramento Pension Fund, that is, the purchase of 363 Spencer, Monterey, by the Pension Trust,

All in violation of Title 18, United States Code, Section 1954 and Section 2.

COUNT THREE (Title 18, United States Code, Section 1954)

The Grand Jury further charges, THAT

On or about June 27, 1985, in the County of Monterey, State and Northern District of California, the defendant,

PAUL FAIRFAX SOARES,

did solicit, receive, and agree to receive a fee, kickback, commission, money, and thing of value, that is, approximately $35,000 investment in Casa Vista and fees of $1100 to Tamarack, from Joseph Rawitzer, because of Tamarack actions, decisions, and other duties relating to questions and matters concerning the Sacramento Pension Fund, that is, the purchase of the Colton and Pelican Roads Property, Monterey County, by the Pension Trust,

All in violation of Title 18, United States Code, Section 1954 and Section 2.

COUNT FOUR (Title 18, United States Code, Section 1954)

The Grand Jury further charges, THAT

On or about June 27, 1985, in the County of Monterey, State and Northern District of California, the defendant,

PAUL FAIRFAX SOARES,

did solicit, receive and agree to receive a fee, kickback, commission, money, and thing of value, that is, approximately $40,000 investment in Casa Vista and fees of $3050 to Tamarack from Sarita Waite, Julie Packard and Linda Rhodes, because of Tamarack actions, decisions, and other duties relating to questions and matters concerning the Sacramento Pension Fund, that is, the purchase of 263 Lighthouse, Pacific Grove, by the Pension Fund,

All in violation of Title 18, United States Code, Section 1954 and Section 2.

COUNT FIVE (Title 18, United States Code, Section 664)

The Grand Jury further charges, THAT

On or about September 5, 1985, in the County of Monterey, State and Northern District of California, and elsewhere, the defendant,

PAUL FAIRFAX SOARES,

did embezzle, steal and unlawfully and willfully abstract and convert to his own use in the approximate amount of

$2364.84, a Jenn-Air stove, the property of the Sacramento Pension Trust, an employee pension benefit plan subject to title 1 of the Employee Retirement Income Security Act of 1974 and of a fund connected with such plan,

All in violation of Title 18, United States Code, Section 664.

COUNT SIX (Title 18, United States Code, Section 664)

The Grand Jury further charges, THAT

On or about January 30, 1986, in the county of Monterey, State and Northern District of California, the defendant,

PAUL FAIRFAX SOARES,

did embezzle, steal and unlawfully and willfully abstract and convert to his own use in the approximate amount of $1861.57, the money, funds, and other assets of the Sacramento Pension Trust, an employee pension benefit subject to title 1 of the Employee Retirement Income Security Act of 1974 and a fund connected with such plan,

All in violation of Title 18, United States Code, Section 664.

COUNT SEVEN (Title 18, United States Code, Section 664)

The Grand Jury further charges, THAT

On or about March 9, 1986, in the County of Monterey, State and Northern District of California, the defendant,

PAUL FAIRFAX SOARES,

did embezzle, steal, and unlawfully and willfully abstract and convert to his own use in the approximate amount of $20,000, the money, funds, credits, property and other assets of the Sacramento Pension Trust, an employee pension benefit plan subject to title 1 of the Employee Retirement Income Security Act of 1974 and of a fund connected with such a plan,

All in violation of Title 18, United States Code, Section 664.

DATE:

A TRUE BILL

_____

FOREPERSON

/s/ William T. McGivern, Jr.
WILLIAM T. McGIVERN, JR.
United States Attorney

(Approved as to form: /s/ RLD)
AUSA ROBERT L. DONDERO

FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defence.

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§ 664. Theft or embezzlement from employee benefit plan

Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use or to the use of another, any of the moneys, funds, securities, premiums, credits, property, or other assets of any employee welfare benefit plan or employee pension benefit plan, or of any fund connected therewith, shall be fined not more than $10,000, or imprisoned not more than five years, or both.

As used in this section, the term "any employee welfare benefit plan or employee pension benefit plan" means any employee benefit plan subject to any provision of title I of the Employee Retirement Income Security Act of 1974.

Added Pub.L. 87-420, § 17(a), Mar. 20, 1962, 76 Stat. 41, and amended Pub.L. 93-406, Title I, § 111(a)(2)(A), Sept. 2, 1974, 88 Stat. 851.

§ 1954. Offer, acceptance, or solicitation to influence operations of employee benefit plan

Whoever being –

(1) an administrator, officer, trustee, custodian, counsel, agent, or employee of any employee welfare benefit plan or employee pension benefit plan; or

(2) an officer, counsel, agent, or employee of an employer or an employer any of whose employees are covered by such plan; or

(3) an officer, counsel, agent, or employee of an employee organization any of whose members are covered by such plan; or

(4) a person who, or an officer, counsel agent, or employee of an organization which, provides benefit plan services to such plan

receives or agrees to receive or solicits any fee, kickback, commission, gift, loan, money, or thing of value because of or with intent to be influenced with respect to, any of his actions, decisions, or other duties relating to any question or matter concerning such plan or any person who directly or indirectly gives or offers, or promises to give or offer, any fee, kickback, commission, gift, loan, money, or thing of value prohibited by this section, commission, gift, loan, money, or thing of value prohibited by this section, shall be fined not more than $10,000 or imprisoned not more than three years, or both: *Provided*, That this section shall not prohibit the payment to or acceptance by any person of bona fide salary, compensation, or other payments made for goods or facilities actually furnished or for services actually performed in the regular course of his duties as such person, administrator,

officer, trustee, custodian, counsel, agent, or employee of such plan, employer, employee organization, or organization providing benefit plan services to such plan.

As used in this section, the term (a) "any employee welfare benefit plan" or "employee pension benefit plan" means any employee welfare benefit plan or employee pension benefit plan, respectively, subject to any provision of title I of the Employee Retirement Income Security Act of 1974, and (b) "employee organization" and "administrator" as defined respectively in sections 3(4) and (3)(16) of the Employee Retirement Income Security Act of 1974.

(added Pub.L. 87-420, § 17(e), Mar. 20, 1962, 76 Stat. 42, and amended Pub.L. 91-452, Title II, § 225, Oct. 15, 1970, 84 Stat. 930; Pub.L. 93-406, Title I, § 111(a)(2)(C), Sept. 2, 1974, 88 Stat. 852.)